

REMARKS

Applicant respectfully requests reconsideration and allowance of claims 1-79 that are pending in the above-identified patent application.

In numbered part 1 of the Office Action, the Examiner stated that new formal drawings were required. In response, Applicant submits on even date herewith formal drawings containing FIGS. 1, 2, 3A-B, 4, 5A-5B, and 6-10.

In numbered parts 2-3 of the Office Action, the Examiner rejected claims 1-6, 8, 13, 15-19, 27, 30, 31, 34, 43, 45-48, 54, 57-59, 61, 63, 66, and 68-73 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,429,748 ("the Nicholls II reference"). Applicant respectfully traverses the Examiner's rejection.

Applicant respectfully submits that the Nicholls II reference is not § 102(e) prior art to the instant application. The instant application was filed January 11, 2001 and claims the benefit of U.S. Provisional Patent Application No. 60/238,224, filed October 5, 2000. As the claims at issue are supported under 35 U.S.C. § 112 by the earlier filed Provisional Patent Application, such claims enjoy a filing date of October 5, 2000.

The Nicholls II reference was filed December 11, 2000, which does not predate the October 5, 2000 filing date of the subject claims of the instant application. Although the Nicholls II reference is a Continuation-In-Part of an earlier filed parent application, U.S. Patent Application No. 09/409,989, filed September 30, 1999, issued as U.S. Patent No. 6,326,854 ("the Nicholls I reference"), for the reasons presented below the teachings of the Nicholls II reference upon

which the Examiner relies in making his rejection of the subject claims are not supported by the Nicholls I reference and, therefore, are not entitled to the filing date of September 30, 1999.

In order to carry back the 35 U.S.C. § 102(e) critical date of a U.S. Patent reference to the filing date of a parent application, the parent application must (i) have a right of priority to the earlier date under 35 U.S.C. § 120; and (ii) support the invention claimed as required by 35 U.S.C. § 112, first paragraph. "[I]f a patent could not theoretically have issued the day the application was filed, it is not entitled to be used against another as 'secret prior art'" under 35 U.S.C. § 102(e). MPEP § 2136.03(IV); *In re Wertheim*, 646 F.2d 527, 537 (CCPA 1981).

Here, the Examiner relies on the teachings of the Nicholls II reference found in FIGS. 7A and 7B. Neither these figures, nor any discussion thereof are found in the Nicholls I reference. Thus, the teachings of the Nicholls II reference upon which the Examiner relies in making his rejection of the subject claims of the instant application receives a critical date of December 11, 2000, not the earlier filing date of the Nicholls I reference. Since the filing date of the Nicholls I reference does not predate the October 5, 2000 filing date enjoyed by the subject claims of the instant application, the Nicholls II reference cannot be § 102(e) prior art to the subject claims of the instant application.

Accordingly, Applicant submits that the Examiner's § 102(e) rejection of the subject claims is misplaced and should be withdrawn.

Applicant acknowledges with appreciation that in numbered part 4 of the Office Action, the Examiner deemed claims 7, 9-12, 14, 20-26, 28, 29, 32, 33, 35-42, 44, 49-53, 55, 56, 60, 62, 64, 65, 67, and 74-79 to contain patentable subject matter.

In view of the foregoing, Applicant submits that the instant claims are in condition for allowance. Early and favorable action is earnestly solicited. If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicant's attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: October 31, 2002

Respectfully submitted,

By 

Matthew B. Dernier

Registration No.: 40,989

LERNER, DAVID, LITTENBERG,

KRUMHOLZ & MENTLIK, LLP

600 South Avenue West

Westfield, New Jersey 07090

(908) 654-5000

Attorneys for Applicant

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